

BRITISH COLUMBIA LABOUR RELATIONS BOARD

LONSDALE HOTELS INC.

(the "Employer")

-and-

NATIONAL AUTOMOBILE, AEROSPACE AND AGRICULTURAL
IMPLEMENT WORKERS UNION OF CANADA (CAW-CANADA, LOCAL 3000)

(the "Union")

PANEL: Maria Giardini, Vice-Chair
Keith Oleksiuk, Vice-Chair
Barb Junker, Vice-Chair

COUNSEL: Israel Chafetz, for the Employer
John Bowman, for the Union

CASE NO.: 21161

DATE OF HEARING: December 23, 1994

DATE OF DECISION: April 3, 1995

DECISION OF THE BOARD

I. INTRODUCTION

1 The Union applies under Section 141 of the *Labour Relations Code* for leave to appeal the original panel's decision in BCLRB No. B459/94. The Union appeals the original decision on the ground that it is inconsistent with the principles expressed or implied in the Code. Specifically, the Union takes issue with the original panel's conclusion that one membership card could not be relied on because the individual who signed it sincerely, though incorrectly, believed that a vote would be held before the Union made an application for certification.

2 The Panel was satisfied that the issue raised by the Union demonstrated a good arguable case of sufficient merit as set out in *Brinco Coal Mining Corporation*, BCLRB No. B74/93 (Leave for Reconsideration of BCLRB No. B6/93), (1994) 20 CLRBR (2d) 44, (1993) 25 CLLC ¶16,043. Therefore, the Union's leave application was granted and the parties were asked to present oral argument to this Panel on the merits.

II. ORIGINAL DECISION

3 The original decision involved an application for certification by the Union for front desk, housekeeping and maintenance department employees of the Lonsdale Quay Hotel. The Union's application was supported by 55% of the employees in the proposed unit. However, the Employer argued that the Union's membership evidence should not be relied on as the basis for determining employee wishes.

4 The Employer called three employees who testified about the organizing techniques of the Union organizer. In this summary we will only deal with the evidence of the employee whose card the original panel eventually rejected and the evidence of the Union organizer who communicated with that employee.

5 Shampcy Sightler, the employee in question, testified that Gary Stribny, the Union organizer, called her and asked whether she was interested in joining the Union. She accepted

his offer for information about the certification process. She testified that Stribny called her two or three times each week. At one point, Sightler said, she asked Stribny not to call her because her fiancé was at home recuperating from an illness.

6 Sightler testified that Stribny told her the Union would hold a secret meeting with the employees to discuss what the employees wanted the Union to do and what the Union could do. Sightler testified that Stribny said the employees had to first sign a membership card in order to attend the meeting. According to Sightler, Stribny also said that the Union would hold a vote among the employees to determine whether an application for certification should be made to the Board. Sightler said she signed a membership card at the end of August so that she could attend the meeting, participate in the discussion and then vote. Sightler said she heard nothing from the Union. She learned that an application for certification had been made when she saw the Board's notice regarding the certification application posted at the workplace. Sightler was upset that the Union had not called a meeting as she understood it would. She then went to the general manager of the hotel to ask him questions about the Union's application.

7 In cross-examination, Sightler testified that she had expected a meeting and a vote. However, she acknowledged that she received the Union's information package and nothing in that package suggested a vote. Sightler insisted that Stribny told her there would be a meeting to discuss how the Union would negotiate with the Employer and she reiterated that Stribny said there would be a meeting and a vote.

8 Stribny said he talked to Sightler approximately three times. However, he later acknowledged that he may have called her more than three times because he had not received her membership card when he expected. He eventually received Sightler's membership card in mid-September and never called her again. According to Stribny he never said there would be a vote prior to the application for certification.

9 In the original decision the panel set out the arguments made by each of the parties and reviewed the applicable jurisprudence. It also reviewed the evidence. The original panel noted there was inconsistency in virtually every witnesses' evidence. It stated that it had no doubt Stribny clearly understood the Union's direction to its organizers; namely, that organizers were not to ask employees to sign cards conditional on meetings or votes. The original panel

specifically stated: "We accept Stribny's evidence that he did not make such a statement" (p. 12). The original panel then analyzed the evidence as follows:

If our decision turned solely on Stribny's statements, we would accept Sightler's card. It does not. The issue is the basis on which Sightler signed the card. On the balance of probabilities, we are satisfied that Sightler signed the membership card because she believed it was necessary to do so in order to be invited to a membership meeting. At that meeting a negotiating committee would be elected and bargaining proposals discussed. There may well have been a discussion between Sightler and Stribny on some kind of vote. Sightler believed, however, that there would be a vote held to decide whether or not to make the application for certification. We are satisfied that Sightler believed that all of this was to be done prior to the Union making its application for certification. Sightler was not correct but she sincerely believed this would occur. We are satisfied that Sightler's membership card can not be relied upon given the basis on which she believed she signed it. It follows that the Union's application is no longer supported by 55% of the employees in the proposed unit. (p. 13)

Consequently, a majority of the original panel concluded that Sightler's membership card should not be considered. As a result the Union's membership evidence fell below 55% and a representation vote was ordered.

10 The dissenting Member of the original panel concluded that the Employer had not met the threshold to establish a *prima facie* case of impropriety and consequently dismissed the Employer's objection. The dissenting Member stated she was convinced by the Union's evidence that the Union did not promise the employees a meeting and a vote prior to making the application for certification.

III. POSITION OF THE PARTIES

11 The Union argues that the original decision is an unusual one in that there was no finding of impropriety on the part of the Union. However, notwithstanding the absence of any impropriety, the original panel refused to consider the membership evidence of one individual. The Union argues that, to its knowledge, in previous cases the Board found improprieties before

it refused to consider membership evidence.

12 The Union notes that the original panel accepted Stribny's evidence that he did not promise a vote. According to the Union this means, by implication, that Sightler's evidence was rejected. The Union also points out that the original panel found nothing in the information package which suggested a vote would be held. Given these findings, the Union argues the original panel erred in excluding the membership card only on the basis that Sightler believed she would have the opportunity to vote.

13 The Union argues that the original panel has established a new test based on an employee's sincere belief. The Union asserts this cannot be the test because such a test negates the very reason for the automatic certification provisions of the Code. The Union argues that such a test is subjective and could lead to all kinds of mischief. The Union questions how future panels will be able to determine if a person's belief is sincere. The Union points out that people believe all sorts of things and that beliefs can be based on faith or other considerations.

14 The Union argues it is not appropriate for the Board to become involved in a subjective analysis in order to consider the validity of membership evidence. The Union asserts that, if the test for determining the acceptability of a membership card is sincere belief, there is no way in which a union can take steps to protect itself. No matter what the Union does and no matter what materials it provides to prospective members it has no way of controlling what those prospective members choose to believe. The Union argues such a test is far too subjective and will ultimately undermine the automatic certification provisions of Code.

15 The Employer argues that its position is guided by the principle that a membership card must accurately reflect the true wishes of the employee. The Employer says the issue is not about what the Union did or did not do but what the Board should take from the fact that a card is signed. The Employer argues the original panel made a determination about the basis on which Sightler signed the membership card and the meaning which should be attributed to that card.

16 The Employer argues that, in coming to its conclusion, the original panel made a finding of fact that Sightler's membership was conditional and equivocal. In other words, the original panel made a finding of fact that Sightler genuinely did not understand her card as an

unconditional commitment to the Union. She understood that the effect of signing the card would be admission to a meeting. Consequently, argues the Employer, the original panel made a finding of fact that Sightler's card could not be relied on as evidence of her membership in the Union. The Employer argues that this is consistent with previous Board decisions, in particular: *Royal City Taxi*, BCLRB No. B266/94 (Affirmed on Reconsideration, BCLRB No. B447/94).

17 The Employer argues the original panel found, as a fact, that Sightler believed she could not vote on the issue of whether certification could be applied for unless she signed a card. The Employer argues two very significant inferences flow from that finding. One inference is that Sightler's belief, though it may have been a misapprehension, had a coercive effect upon her. The second inference is that Sightler did not believe the Union would pursue any certification, therefore, her misapprehension went to the very core of her membership.

18 The Employer argues that Sightler's card did not represent a commitment to the Union nor to the unionization of her workplace. The Employer says whether or not Sightler contributed to, or even authored, her misapprehension is irrelevant to the determination of whether the card can be said to represent her true wishes. The Employer asserts that the issue before the original panel, and before us, is what the signed card represents rather than the reason for that representation. The Employer says the original panel focused on the true wishes of the employee who was signatory to the challenged card. In doing so, the Employer submits, the original panel followed long-standing Board jurisprudence.

19 The Employer argues that the Board has a long-standing practice of reviewing membership evidence in circumstances in which the membership does not represent a commitment to the union. The Employer argues that the original panel's factual findings negate any conclusion that Sightler demonstrated the type of commitment to the Union which a membership card assumes. The Employer argues that Sightler's card was properly set aside as membership evidence in accordance with the Board's jurisprudence. It argues we would be overturning factual findings made by the original panel if we reach a different conclusion.

20 The Employer further argues that the question we must consider is whether any reliance can be placed on Sightler's card. The Employer argues that signing a membership card is the same as casting a vote in favour of the Union. Therefore, if a person were to cast a vote because

she wanted to go to a meeting but not because she wanted to be a member of the Union the card ought not to be taken as a "vote" for the union. If a card were signed on such a basis it makes the card equivocal and conditional because it does not express what the employee wants to express. The Employer says this is a difficult case and ultimately the original panel had to consider the evidence of the witnesses. The Employer says, based on the evidence, the majority of the original panel concluded they had a reasonable doubt as to the meaning of the card and, therefore, excluded it.

IV. ANALYSIS

21 As stated by the original panel there is a presumption that signed membership cards, which meet the minimum requirements of Regulation 3, are *bona fide* evidence of membership support. That presumption is reflected in Section 23(1) of the Code which provides that if the Board is satisfied that not less than 55% of employees in a unit are members in good standing of an applicant trade union, the Board must automatically certify the union as bargaining agent for the employees in that unit. The panel in *Plateau Mills*, BCLRB No. 87/76, [1977] 1 Can LRBR 82, noted that reliance on membership cards was based on an assumption that the cards were a decent substitute for a vote because they expressed the free choice of employees.

22 Since promulgation of the Code in 1993 the Board has, in a number of cases, commented on the circumstances in which such reliance may be questioned. For a review of some of these cases see *Surtek Industries Inc.*, BCLRB No. B346/94 and *Midway Tire Limited*, BCLRB No. B311/94. Those two cases note that challenges to the validity of membership evidence generally fall into one or more of the following categories:

- 1.failure to strictly adhere to the minimum technical requirements set out in Regulation 3;
- 2.fraudulent or illegal organizational tactics;
- 3.coercion/intimidation by way of threats or inducements;
- 4.misrepresentations during the course of organizing which render a signed

membership card conditional or equivocal.

The case before us raises the question of whether there exists a fifth category for a valid challenge; namely, misunderstanding of the purpose for which the membership card is to be used. Such a misunderstanding could potentially arise under categories 2 (fraud) and 4 (misrepresentation) above. However, in the case before us there is no finding of fraud or misrepresentation.

23 The original panel found, as a fact, that the employee's understanding (or misunderstanding) of the purpose of the card was not the product of any representations made or other actions taken by the Union's organizer. The original panel found that Sightler sincerely, though mistakenly, believed a meeting and vote would be held to decide whether the Union would make an application for certification.

24 In our view, the central issue to be decided on this appeal is whether the test adopted by a majority of the original panel to assess the reliability of the membership evidence is correct.

25 The original decision appears to stand for the proposition that where a union or its organizers engage in no wrongdoing and where there are no objective grounds to explain or justify a person's stated belief as to why she signed a union membership card the Board will, if it finds that person's stated belief to be sincere, treat the card as invalid. We do not find this to be consistent with the policy of the Board to date. The "sincere belief" test is a wholly subjective test and, if adopted, it would open the door to after-the-fact challenges of otherwise valid membership evidence. We agree with the conclusion in *C-Tron Systems Ltd.*, BCLRB No. B39/95, that such a subjective test is not one which should be adopted by this Board.

26 In *C-Tron Systems Corp.*, the Board considered, in a decertification context, how the true wishes of employees were to be determined. The panel in that case stated:

How are "true wishes" to be determined? Is the standard objective or subjective? We find that the proper standard is an objective, not subjective [sic]. The use of an objective test was confirmed in *South Surrey Hotel Ltd.*, BCLRB No. B25/94 which dealt with evidence in an unfair labour practice complaint. The logic for an objective test here is equally if not more convincing. (para. 26)

27 A similar approach can and should be taken when assessing the validity of membership evidence in a certification application. A panel should look at the objective evidence before it, not the subjective beliefs of an individual, to determine whether a signed membership card is valid. In considering an employee's true wishes the Board must look at the objective evidence. Did the employee sign a Union card? In doing so, did the employee understand she was joining a union? In other words, did the employee know the nature of the transaction?

28 If an employee knows the nature of the transaction and if the signing of the membership card is voluntary then, absent fraud or misrepresentation, the reason for signing the card is not a relevant factor to consider. In *Johnson Controls Ltd.*, [1991] 8 CLRBR (2d) 198, the Ontario Labour Relations Board considered whether motive was relevant in a situation where an employee alleged he signed a membership card as a joke. The Board said:

... He tried to characterize the transaction as a "joke", and, at one point, suggested L. Robinson had "taken advantage of him" because of his inebriated state. There is no dispute that S. McKibbon had been drinking. However, the Board finds that he knew full well the nature of the transaction. His motive in signing the card (whether he sought to impress his friends, for example) is of no concern to the Board as the Board is satisfied his act in joining the Union was voluntary. (para. 15)

Later in the analysis of that case the Ontario Board further commented:

... The Board is not concerned with the reasons N. Kiraly and S. McKibbon decided to join the union absent intimidation, coercion or improper inducement. That is, whether S. McKibbon joined as a joke or as a "macho" act is irrelevant given the absence of improper conduct by the union and the fact that S. McKibbon applied for membership, paid the \$1 initiation fee on his own behalf and, as noted earlier, knew full well the nature of this transaction in which he voluntarily participated.... (para. 23)

29 In our view, this Board should follow the same kind of objective approach taken by the Ontario Board.

30 In order to find that a signed membership card is conditional and/or equivocal, there must be some objective nexus between the conduct or misconduct of the Union and its organizers and the signing of the membership card by an employee. In other words, absent fraud or misrepresentation, a membership card will not be rendered equivocal or conditional simply because an employee has a sincere understanding or belief about how the card will be used by the Union.

V. CONCLUSION

31 We find that the test adopted by the majority of the original panel is not correct. Consequently, Sightler's membership card should not have been rejected. Sightler's card should have been considered when reviewing the Union's membership evidence. If her card had been considered the Union would have met the preconditions for automatic certification set out in Section 23(1) of the Code. Accordingly, we find that the Union had sufficient support for automatic certification and order that a certification be issued.

LABOUR RELATIONS BOARD

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